

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BETTY M. MUDGE and RAY MUDGE,

UNPUBLISHED

Plaintiffs-Appellants,

v

No. 194363

Oakland Circuit Court

CITY OF SOUTH LYON and RODNEY L. COOK,

LC No. 95-495977-NZ

Defendants-Appellees.

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Before: Smolenski, P.J., and Michael J. Kelly and Gribbs, JJ.

MICHAEL J. KELLY, J. (dissenting).

Because I conclude that the evidence established that neither Betty Mudge nor Ray Mudge actually reported Julie Zemke's misuse of the dog tag funds to a public body, I respectfully dissent from the majority's holding that the trial court erred in granting defendants' motion for summary disposition because plaintiffs were engaged in protected activity under the Whistleblowers' Protection Act.

The Whistleblowers' Protection Act was enacted to protect employees who report violations of laws and regulations, with the underlying purpose of protecting the public. *Dolan v Continental Airlines*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 102413, rel'd 5/20/97) slip opinion at 6-7; *Chandler v Dowell Schlumberger, Inc*, 214 Mich App 111, 121; 542 NW2d 310 (1995). As a panel of this Court explained in *Chandler, supra*:

Violations of laws, rules, and regulations by employers do not just harm their employees but, by definition, also harm the interest of the public at large. However, the public is obviously not as likely to discover these violations as are employees. Statutory protection of the employee who reports a violation serves to encourage reporting by an employee who might otherwise be fearful of the consequences. As a result, the public is better served. In contrast, we do not believe that protection of employees who either are unable or unwilling to report violations of laws, rules, or regulations significantly encourages reporting. In fact, it is arguable that such protection under the WPA could

discourage actual reporting where employees are cognizant that they will be protected absent any invocation of their civic duty [to report wrongdoing]. *Id.*

Thus, the WPA offers no protection to employees who are not engaged in protected activity, which the Act defines as reporting, or being about to report, a violation or a suspected violation of law, regulation, or rule promulgated pursuant to law, to a public body by the employee or a person acting on the employee's behalf. *Id.* at 114.

The evidence established that neither Betty, Ray, nor anyone acting on their behalf reported Zemke's wrongdoing to a public body. Betty did not report the Zemke incident to Erik Mayernik or to any member of a public body. Neither did she instruct her husband Ray to report the violation on her behalf. Ray did not inform Betty beforehand that he planned to consult Mayernik; she found out that he had done so only after the fact. While it is true that Betty was the "unwitting source" of information concerning the misuse of public funds, she was not the whistleblower.

Plaintiffs' contention that Ray was Betty's agent and that Ray reported the offense to Mayernik, who was acting in his capacity as a public official, is belied by the deposition testimony. Ray merely sought from Mayernik, as a trusted family friend and current law student, advice regarding the legality of Zemke's action and the possible ramifications of Betty's failure to timely discover and report her supervisor's impropriety. Ray was not, in common understanding, "reporting" the check-cashing incident to Mayernik as a police officer, but was merely seeking his friend's counsel. When Mayernik informed Ray the following day that he had indeed reported Zemke's violation to the Sheriff's Department and a representative from that office was on its way to his wife's office to investigate, Ray was shocked and unequivocally protested. Mayernik testified, "[The Mudgetts] didn't want me to talk to [the Sheriff's Department] or actually report the crime . . . until after they[] had an opportunity to discuss . . . what they were going to do."

The only inference to be drawn from the evidence is that Mayernik exceeded the bounds of his friend's consultation. As the majority aptly recognizes, Mayernik was acting pursuant to his independent duty "[a]s a police officer sworn to uphold the law" when he contacted the Sheriff's Department. Thus, he was not acting on the Mudgetts' behalf at all when he independently decided to contact the proper authorities. The Mudgetts were simply unwilling to report Zemke's wrong, and therefore fell outside the aegis of the Whistleblower's Protection Act. *Id.* at 121. Ray Mudgett's thought process is not tracked by the majority and may not be important to its disposition but Betty, the employee, clearly did not report and clearly was not "about to report" a violation to anybody, public or private.

In light of these considerations, I would vote to affirm the trial court's order granting defendant's motion for summary disposition as to plaintiffs' claim for violation of the Whistleblowers' Protection Act. Therefore, I find no reason to further address the issue whether plaintiffs provided sufficient evidence to establish a genuine issue of material fact regarding the pretextual nature of defendants' explanation for Betty's suspension. Lastly, I agree with the

majority's conclusion that the trial court did not err in disposing of plaintiffs' due process claims by granting defendant's motion for summary disposition as to this issue.

I would affirm.

/s/ Michael J. Kelly